Appendix A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 74-1680, 74-1847 and 74-1870

No. 74-1680

ON PETITION FOR WRIT OF MANDAMUS

PFIZER, INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION AND THE UPJOHN COMPANY, *Appellants*,

v.

HONORABLE MILES W. LORD, United States District Judge, *Respondent*,

and

THE REPUBLIC OF VIETNAM, THE IMPERIAL GOVERNMENT OF IRAN, THE REPUBLIC OF THE PHILIPPINES BY AND THROUGH THE CENTRAL BANK OF THE PHILIPPINES, *Appellees*.

No. 74-1847

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

PFIZER, INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION AND THE UPJOHN COMPANY, *Appellants*,

v.

THE REPUBLIC OF VIETNAM, THE IMPERIAL GOVERNMENT OF IRAN, THE REPUBLIC OF THE PHILIPPINES BY AND THROUGH THE CENTRAL BANK OF THE PHILIPPINES, *Appellees*.

No. 74-1870

ON PETITION FOR WRIT OF MANDAMUS

PFIZER, INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION AND THE UPJOHN COMPANY, *Appellants*,

v.

HONORABLE MILES W. LORD, United States District Judge, *Respondent*,

and

THE GOVERNMENT OF INDIA, *Appellee*.

Submitted: March 31, 1975
Filed: August 27, 1975

Before GIBSON, *Chief Judge*, LAY and ROSS, *Circuit Judges*.

LAY, *Circuit Judge*.

Several foreign governments[1] have filed antitrust suits alleging that the defendants,[2] six major pharmaceutical firms, conspired to fix prices on certain broad-spectrum antibiotics purchased by the plaintiff governments and

[1] The governments involved in this appeal are the Government of India, the Imperial Government of Iran, the Republic of the Philippines, and the Republic of Vietnam. Several other governments filed similar suits after entry of the orders from which these appeals were taken.

[2] The defendants are Pfizer, Incorporated, American Cyanamid Company, Bristol-Myers Company, Squibb Corporation, Olin Corporation and the Upjohn Company.

their citizens.[3] The cases were consolidated in the District of Minnesota for pretrial proceedings and for trial with numerous other suits known collectively as the Antibiotic Antitrust Cases, and are now pending before Judge Miles Lord. The history and background of this litigation have

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[3] After a new government gained power in South Vietnam, we requested briefs of the parties and the United States as amicus curiae on the effect of those events on the right of the government known as The Republic of Vietnam (RVN, the former government) to prosecute this action.

The Justice Department contacted the State Department to ascertain whether the United States currently recognized any government for the territory of South Vietnam. The State Department replied in the negative, stating that the United States no longer recognized the RVN and that it had not yet recognized the new *de facto* government either. The State Department indicated that it did not contemplate any change in this posture in the near future, and it recommended that RVN's suit be dismissed rather than suspended.

The rule is that unrecognized governments may not maintain suits in state or federal courts. *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 136-41 (1938); *Federal Republic of Germany* v. *Elicofon*, 358 F.Supp. 747 (E.D.N.Y. 1972), *aff'd*, 478 F.2d 231 (2nd Cir. 1973), *cert. denied*, 415 U.S. 931 (1974); *accord*, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 408-12 (1964).

Dismissal without prejudice of Vietnam's claim would seem to extinguish any possibility for the nation of Vietnam to collect the damages it claims, since the statute of limitations apparently ran in 1974. Presumably, then, even if a new government were soon recognized, a new action could not be timely filed.

Another possibly proper course might be to suspend rather than dismiss the proceeding with regard to Vietnam for a reasonable time to see if a new government will be recognized, and if so, whether it would want to pursue this litigation. *See, e.g.*, *Bank of China* v. *Wells Fargo Bank & Union Trust Co.*, 190 F.2d 1010 (9th Cir. 1951); *Republic of China* v. *Merchants Fire Assur. Corp.*, 30 F.2d 278 (9th Cir. 1929); *Government of France* v. *Isbrandtsen-Moller Co., Inc.* 48 F. Supp. 631 (S.D.N.Y. 1943). Since we do not pass on the question of whether a foreign sovereign has standas a "person" under § 4 of the Clayton Act, the district court will

been summarized in *Pfizer, Inc.* v. *Lord*, 456 F.2d 532 (8th Cir.), *cert. denied*, 406 U.S. 976 (1972).

The foreign governments assert in their complaints three theories of recovery, the last two of which would seem to be mutually exclusive since they involve the same claims. First, the governments ask treble damages based on their own purchases of defendants' antibiotics. Second, they sue under a *parens patriae* claim as "official representative" of their individual and corporate citizens who purchased defendants' products. Third, they assert their right to serve as representatives of the class of all their citizens who have treble damage claims against defendants.

The defendants moved to dismiss the first claim on the ground that a foreign government is not a "person" entitled to bring a treble damage action under Section 4 of the Clayton Act. They asked dismissal of the second or official representative theory on the ground that absent formal assignment of these claims the governments could not sue on them outside the class action rules of Fed. R. Civ. P. 23. The district court denied both motions.

The defendants seek reversal of these interlocutory rulings:

> (1) That foreign governments are "persons" entitled to sue for treble damages under § 4 of the Clayton Act; and
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> (2) That foreign governments may sue to collect the treble damage claims of their citizens, without complying with the requirements of Fed. R. Civ. P. 23 for class actions.

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have to face the question of suspension or dismissal on remand. We need not decide whether Vietnam's *parens patriae* claim brought on behalf of its nationals should be dismissed or suspended since as we shall discuss the *parens patriae* claim fails to state grounds for relief.

I. MANDAMUS.

The first issue, that is, whether the foreign governments are persons within the meaning of § 4 of the Clayton Act, is presented here by writ of mandamus, since the district court refused to certify the question for interlocutory appeal under 28 U.S.C. § 1292(b).[4] We do not reach the merits of this question since in our view mandamus does not lie to review this ruling of the district court.

The traditional use of the writ in aid of appellate jurisdiction has been to confine a lower court to a lawful exercise of its prescribed jurisdiction. Thus, "[t]he writ is appropriately issued . . . when there is a 'usurpation of judicial power' or a clear abuse of discretion." *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110 (1964); *River Valley, Inc.* v. *Dubuque Cty.*, 507 F.2d 582, 585 (8th Cir. 1974). However, mandamus is not to be used when the most that can be claimed is that the district judge may have erred in ruling on a question clearly within his jurisdiction. *Will* v. *United States*, 389 U.S. 90, 104 (1967).

The district court was presented with a difficult question of statutory interpretation, a question apparently of first impression. Even if its decision were erroneous (and we intimate no view on the merits), under the circumstances of this case it would not constitute a clear abuse of discretion.

Further, the mere fact that a court might err even on

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[4] The defendants also challenge the propriety of the district court's refusal to certify this question under § 1292(b). This court is without jurisdiction to review an exercise of the district court's discretion in refusing such certification. *See United States* v. *687.30 Acres of Land*, 451 F.2d 667 (8th Cir. 1971), *cert. denied sub nom., Winnebago Tribe* v. *United States*, 405 U.S. 1026 (1972); *accord, Leasco Data Processing Equip. Corp.* v. *Maxwell*, 468 F.2d 1326, 1344 (2nd Cir. 1972) (Friendly, J.); Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607, 616-617 (1975).

jurisdictional questions does not necessarily amount to a usurpation of power making mandamus appropriate.

> [J]urisdiction need not run the gauntlet of reversible errors. The ruling on a question of law . . . was made in the course of the exercise of the court's jurisdiction to decide issues properly brought before it. . . . Its decision against petitioner, even if erroneous—which we do not pass upon—involved no abuse of judicial power.

River Valley, Inc. v. *Dubuque City*, *supra*, at 585, quoting from *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 382 (1953).

In *Stein* v. *Collinson*, 499 F.2d 91 (8th Cir. 1974), our court refused to reach the merits of a petition for writ of mandamus on a jurisdictional question arising out of a Chapter X reorganization proceeding. The court quoted the following from *American Airlines* v. *Forman*, 204 F.2d 230, 232 (3rd Cir. 1953):

> It is true that this petition . . . challenges what can fairly be called a jurisdictional ruling. But that difference alone is not enough to make a peremptory writ appropriate. . . . The challenged assumption or denial of jurisdiction must be so plainly wrong as to indicate failure to comprehend or refusal to be guided by unambiguous provisions of a statute or settled common law doctrine. If a rational and substantial legal argument can be made in support of the questioned jurisdictional ruling, the case is not appropriate for mandamus . . . even though on normal appeal a reviewing court might find reversible error.

499 F.2d at 94.

Accordingly, the petition for a writ of mandamus must be denied.

II. Foreign Governments Suing As Parens Patriae on Behalf of Their Citizens in Antitrust Damage Suits.

The district court did certify for appeal under 28 U.S.C. 1292(b) its order holding that the foreign governments may sue as *parens patriae* on behalf of their individual and corporate citizens without notifying the citizens or fulfilling the other requirements of a Rule 23 class action, and may "apply the proceeds from the litigation to the benefit of their citizens as a whole." Misc. Order No. 74-37, Appendix at 18, 21. The district court recognized that several recent decisions had denied to states of the United States the right to bring similar *parens patriae* actions on the grounds that the defendants might be subjected to duplicate liability, *see e.g., Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 264 (1972); or, if the state suit barred the citizens' claims, that so to "take" their damage claims would be a deprivation of property without due process. *See In re Multidistrict Vehicle Air Pollution Control Equip.*, 481 F.2d 122 (9th Cir.), *cert. denied sub nom., Morgan* v. *Automobile Mfg. Assn.*, 414 U.S. 1045 (1973); *California* v. *Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir.), *cert. denied* 412 U.S. 908 (1973); *Philadelphia Housing Auth.* v. *American Radiator & Standard Sanitary Corp.*, 309 F. Supp. 1057 (E.D. Pa. 1969), *aff'd.*, 438 F.2d 1187 (3rd Cir. 1970). *Cf. In re Hotel Telephone Overcharges*, 500 F.2d 86 (9th Cir. 1974); *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005, 1012 (2nd Cir. 1973), *aff'd on other grounds*, 417 U.S. 156 (1974); *West Virginia* v. *Chas. Pfizer & Co.*, 440 F.2d 1079 (2nd Cir. 1971).

The district court held these objections not applicable here because foreign governments and their resident nationals were concerned. The court found that defendants could not be threatened with duplicate liability because the governments' suit could be given *res judicata* effect and, in any event, the practical difficulties facing foreign nationals would generally prevent them from filing their own suits.

Due process objections to failure to notify the citizens of the litigation and to permit them to participate directly in it and its proceeds, even though it would bar their claims, were dismissed by the court on the ground that "the relationship between a foreign government and *its* citizens is not restricted by the Constitution of the United States." *Misc. Order No. 74-37, Appendix at 18, 21* (emphasis original).

We reverse, and hold that the plaintiff governments may not sue on behalf of their citizens' antitrust damage claims as *parens patriae*. A *parens patriae* action cannot be brought to collect the damage claim of one legally entitled to sue in his own right. The mere fact that the claimant or creditor is a foreign national does not afford him or his government access to judicial procedures barred to domestic creditors. Finally, we are unable to dismiss so easily as did the district court the due process implications of the procedure plaintiffs ask us to approve. In our view, plaintiffs may represent their citizens' damage claims only if they can do so within a Rule 23 class action.

Suits by a sovereign in the *parens patriae* capacity have traditionally been limited to certain narrow areas.[5] Under English law, the king had the prerogative to act as a guardian of persons under such legal disabilities as infancy, incompetency and insanity. In addition, the king superintended charitable uses. In the United States, these *parens patriae* prerogatives were expanded to include the right of a state to sue for the general welfare of its citizens

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[5] The use of *parens patriae* suits by the state on behalf of its citizens is ably discussed in Malina & Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 Nw. U. L. Rev. 193 (1970); Comment, *Wrongs Without Remedy: The Concept of Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 43 S.Cal. L. Rev. 570 (1970); Comment, *State Protection of Its Economy and Environment: Parens Patriae Suits for Damages*, 6 Colum. J. L. & Soc. Prob. 411 (1970).

at large, "to prevent or repair harm to its *'quasi-sovereign'* interests." *See Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 257-258 (1972).

Quasi-sovereign interests were defined by the Supreme Court as "interest[s] apart from [those] of particular individuals who may be affected," *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 451 (1945), and are different from the sovereign's proprietary interests. The latter relate to its direct contracts for purchase of goods and services. Generally these quasi-sovereign interests have been limited to harm to a state's physical environment and relief sought has been injunctive rather than damages. Thus in the area of public nuisance states have been recognized as proper parties to vindicate the quasi-sovereign claims in *parens patriae* suits. *See e.g., Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923) (enjoining interference with flow of natural gas), *Kansas* v. *Colorado*, 206 U.S. 46 (1907) (enjoining diversion of water from an interstate stream), *Missouri* v. *Illinois*, 180 U.S. 208 (1901) (enjoining discharge of sewage into the Mississippi). This right was recognized in *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907), where quasi-sovereign interests were described by Mr. Justice Holmes as "independent of and behind the titles of its citizens, in all the earth and air within its domain."[6]

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[6] Early cases which rejected a state's right to file a *parens patriae* claim were decided on the narrow ground that the Supreme Court lacked original jurisdiction under Article III, § 2 when the state was not asserting a separate interest from its citizens. Thus, in *Oklahoma* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 220 U.S. 277 (1911), Oklahoma sought to assert rights of shippers against a common carrier to restrain it from charging unreasonable rates within its jurisdiction. The Supreme Court denied the state the right to file an original suit in the Supreme Court since the suit did not involve any infringement of power of the State but rather special damage to its shippers. The Court observed:

> We are of the opinion that the words, in the Constitution, conferring original jurisdiction on this court, in a suit "in which a State shall be a party," are not to be interpreted as

The Supreme Court did hold in *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945) that Georgia might have the requisite separable interest to sue for damage to her general economy from an alleged railroad price-fixing conspiracy. In a more recent decision, however, the court indicated that such an interest of a state is not susceptible of measurement, that is, that injuries to the general economy are mainly just the sum of injuries to individual consumers and businesses, and hence, that the quasi-sovereign interest in the general economy could not support a *parens patriae* suit for damages under the Clayton Act. *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972).[7]

The interest relied on in the present case is much different, however, from those previously recognized in *parens patriae* suits. The plaintiff governments assert no quasi-sovereign interest, their only interest is proprietary

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conferring such jurisdiction in every cause in which the State elects to make itself strictly a party plaintiff of record and seeks not to protect its own property, but only to vindicate the wrongs of some of its people or to enforce its own laws or public policy against wrongdoers, generally.

Id. at 289.

See also Oklahoma v. *Cook*, 304 U.S. 387 (1938).

[7] In 1969 the State of Hawaii sought to recover treble damages for overcharges for petroleum products sold to the State itself (the first or "proprietary" count), for damages to the general economy (the second or *parens patriae* count), and as the representative plaintiff for the class of all citizens with treble damage claims (the third or class action count). The district court dismissed the class action count and that was not appealed. The Supreme Court affirmed the Ninth Circuit's holding that the State could not recover for damages to the general economy under the *parens patriae* count. 405 U.S. 251 (1972), *aff'g. Hawaii* v. *Standard Oil Co.*, 431 F.2d 1282 (9th Cir. 1970). The Court held that the "business or property" limitation in the Clayton Act's treble damage provision meant that only damages to the State's commercial interests or enterprises were recoverable by the State; damage to the general economy was not compensable under the Act. 405 U.S. at 265. *See also In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 126 (9th Cir. 1973).

in nature. This would seem to give the governments standing to bring a class action on behalf of their citizens.[8] The governments assert, however, that a class action would not be financially feasible given the Supreme Court's decision in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974). They ask that we expand the concept of *parens patriae* to permit them to sue on behalf of persons legally entitled to sue on their own behalf, but as a practical matter generally unable to do so.

While there are no reported decisions on the right of a foreign government to prosecute such an action, in several recent instances domestic state governments have attempted to do so. So far none has been permitted to recover on that theory, and the Supreme Court has expressed a strong preference for class actions instead.

In *Hawaii*, the Supreme Court referred to the state's failure to appeal the dismissal of its class action count, and then said in *dicta*:

> We note in passing the State's claim that the costs and other burdens of protracted litigation render private citizens impotent to bring treble-damage actions, and thus that denying Hawaii the right to sue for injury to her quasi-sovereign interests will allow antitrust violations to go virtually unremedied. Private citizens are not as powerless, however, as the State suggests.
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> Congress has given private citizens rights of action for injunctive relief and damages for antitrust violations without regard to the amount in controversy. 28 U.S.C. § 1337; 15 U.S.C. § 15. Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources

[8] For purposes of determining this question only, we will assume without deciding that the district court was correct in holding that foreign governments are "persons" entitled to bring treble damage actions under § 4 of the Clayton Act.

to achieve a more powerful litigation posture. The District Court dismissed Hawaii's class action only because it was unwieldy; *it did not hold that a State could never bring a class action on behalf of some or all of its consumer citizens*. . . . The fact that a successful antitrust suit for damages recovers not only the costs of the litigation, but also attorney's fees, should provide no scarcity of members of the Bar to aid prospective plaintiffs in bringing these suits.

Parens patriae actions may, in theory, be related to class actions, but the latter are definitely preferable in the antitrust area. Rule 23 provides specific rules for delineating the appropriate plaintiff-class, establishes who is bound by the action, and effectively prevents duplicative recoveries.

405 U.S. at 265-66 (emphasis added).

This strong preference for class actions over *parens patriae* has been repeatedly expressed. In *Philadelphia Housing Auth.* v. *American Radiator & Standard Sanitary Corp.*, 309 F.Supp. 1057 (E.D. Pa. 1969), Kansas and California sought to collect the treble damage claims of individual citizens via the *parens patriae* and class action routes. Chief Judge John Lord held the *parens patriae* claims to be "without legal foundation or policy support," *id.* at 1063, and an attempt to circumvent the protective limitations of Rule 23.

> Rather than provide a remedy to small-stake consumers allegedly denied by reasons of practicality the opportunity to bring actions available to other class action plaintiffs, allowance of the proposed claims would simply permit circumvention of the restrictions to which other class action plaintiffs are subject. The real advantages which would result from allowance of such claims would accrue to the benefit of plaintiff States. These plaintiffs would be permitted to bring class action suits without being subject to the limitations of ordinary Rule 23 class actions, and in addition would be afforded protection against an adverse decision in the determination of the proper plaintiff to represent various individual consumers in the class

> actions in the case of conflicting claims to representation. But the writers of the revised Rule 23 weighed the problems of manageability, fairness, and judicial economy in establishing the requirements therein, and the Court agrees with defendants that to allow a plaintiff State to recover damages for individual claimants in a substitute type of representative suit without the safeguards here provided would undermine the aims of that Rule.

Id.

See also California v. *Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1973) (California sought treble damages for its citizens against various snack food companies); *In re Motor Vehicle Air Pollution Control Equipment*, 52 F.R.D. 398 (C.D.Cal. 1970), *aff'd.* 481 F.2d 122 (9th Cir. 1973); *Land O'Lakes Creameries* v. *Louisiana St. Bd. of Health*, 160 F.Supp. 387 (E.D. La. 1958); Malina & Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 Nw. U. L. Rev. 193, 215-17 (1970).

We are not persuaded that these decisions are inapplicable merely because the plaintiffs are foreign governments suing on behalf of their nationals. Principles of comity, international law and existing United States treaties do not afford foreign sovereigns the right to press their citizens' claims in a manner barred to domestic states vis-a-vis their citizens. Reliance on authorities which sanction a sovereign's right to represent its citizens when their claim is against another sovereign who has not consented to suit in its own courts is misplaced. Foreign creditors are to be afforded legal access to our courts on the same basis as United States residents; practical difficulties notwithstanding, their status as foreigners does not entitle them to a more favorable remedy and procedures.[9] As the Supreme

[9] The Treaty of Amity & Economic Relations between the United States and Iran, August 15, 1955, [1957] 8 U.S.T. 899, T.I.A.S. No. 3853, is not to the contrary. Article 3, paragraph 2, reads as

Court long ago observed in *New Hampshire* v. *Louisiana*, 108 U.S. 76, 90 (1883):

> There is no principle of international law which makes it the duty of one nation to assume the collection of the claims of its citizens against another nation, if the citizens themselves have ample means of redress without the intervention of their government. Indeed, Sir Robert Phillimore says, in his Commentaries on International law, vol. II., 2nd ed., page 12:
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> "As a general rule, the proposition of Martens seems to be correct, that the foreigner can only claim to be put on the same footing as the native creditor of the State."

Furthermore, in our view the district court may have erred in holding that the Due Process Clause of the Fifth Amendment would not entitle the foreign nationals whose claims are sought to be enforced to notice and an opportunity to participate in or exclude themselves from the litigation. The United States Constitution does not bind foreign governments in their relationship with their nationals, of course, but when rights of nonresident aliens to property within the United States are adjudicated in United States courts, nonresident aliens may well be entitled to due process protection.[10] *See Guessefeldt* v. *Mc-*

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follows in relevant part:

> Nationals and companies of either High Contracting Party shall have freedom of access to the courts of justice and administrative agencies within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in defense and pursuit of their rights, to the end that prompt and impartial justice be done. Such access shall be allowed in any event, upon terms no less favorable than those applicable to nationals and companies of such other High Contracting Party or of any third country. . . .

This merely guarantees access to United States courts on the same terms available to United States nationals, not more favorable terms or additional remedies.

[10] In *Sardino* v. *Federal Reserve Bank*, 361 F.2d 106, 111 (2nd Cir. 1966), Judge Friendly wrote:

> The Government's second answer that "The Constitution of

Grath, 342 U.S. 308, 318 (1952); *United States* v. *Pink*, 315 U.S. 203, 228 (1942); *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481, 489-92 (1931); *Sardino* v. *Federal Reserve Bank*, 361 F.2d 106, 111 (2nd Cir.) (Friendly, J.), *cert. denied* 385 U.S. 898 (1966).

We need not decide here, however, whether the Due Process Clause would of its own force prevent federal courts from permitting these antitrust claims to be compromised or collected in this instance without the consent of their owners. It is settled that when foreign governments invoke the benefits of United States courts to deal with tangible or intangible property located in this country, then their actions and decrees with respect to that property will be upheld only if consonant with the policy and law of the United States. *United States* v. *Pink*, 315 U.S. 203, 228-30 (1942); *Republic of Iraq* v. *First National City Bank*, 353 F.2d 47 (2nd Cir. 1965) (Frendly, J.), *cert. denied*, 382 U.S. 1027 (1966); *Restatement (Second), Foreign Relations Law of the United States*, § 43 (1965). The Supreme Court's emphasis in *Hawaii* on the preference for

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the United States confers no rights on non-resident aliens" is so patently erroneous in a case involving property in the United States that we are surprised it was made. Throughout our history the guarantees of the Constitution have been considered applicable to all actions of the Government within our borders—and even to some without. Cf. Reid v. Covert, 354 U.S. 1, 5, 8, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957). This country's present economic position is due in no small part to European investors who placed their funds at risk in its development, rightly believing they were protected by constitutional guarantees; today, for other reasons, we are still eager to attract foreign funds. In Russian Volunteer Fleet v. United States, 282 U.S. 481, 489, 491-492, 51 S.Ct. 229, 75 L.Ed. 473 (1931), the Court squarely held that an alien friend is entitled to the protection of the Fifth Amendment's prohibition of taking without just compensation—even when his government was no longer recognized by this country. And the Court has declared unequivocally, with respect to non-resident aliens owning property within the United States, that they "as well as citizens are entitled to the protection of the Fifth Amendment."

class actions and its delineation in *Eisen* of the exacting requirements of notice under Rule 23 lead us to find that it would be inconsistent with the policy and law of the United Sates to permit the plaintiff governments to sue as *parens patriae* in this case. This is so even where, as in *Eisen*, the cost of a class action might be prohibitive and the claims are rendered practically unenforceable.

The remedy plaintiffs seek, if it can be made available at all, must come from Congress, who is best able to weigh its economic and political consequences and to consider alternative means of enforcing the antitrust laws of the United States. As Judge Medina observed in *Eisen*:

> [S]tatements about "disgorging" sums of money for which a defendant may be liable, or the "prophylactic" effect of making the wrongdoer suffer the pains of retribution and generally about providing a remedy for the ills of mankind, do little to solve specific legal problems. The result of this approach is almost always confusion of thought and irrational, emotional and unsound decisions. In cases involving claims of money damages all litigation presumes a desire on the part of the judicial establishment to make the wrongdoer pay for the wrongs he has committed, but to do this by applying settled or clearly stated principles of law, rather than by some process of divination. Punishment of wrongdoers is provided by law for criminal acts in statutes making it a crime punishable by fine or imprisonment to violate the antitrust laws. In certain civil suits punitive damages may be awarded; and in private antitrust cases the possible recovery of triple the loss actually suffered by a plaintiff is very properly praised as a supplementary deterrent. But none of these considerations justifies disregarding, nullifying or watering down any of the procedural safeguards established by the Constitution, or by congressional mandate, or by the Federal Rules of Civil Procedure, including amended Rule 23. It is a historical fact that procedural safeguards for the benefit of all litigants constitute some of the most important and salutary protections against oppressions, including oppressions by those whose intentions may be above reproach.

479 F.2d at 1013.

We note that the plaintiff governments did include a class action count in their complaints. Nothing in this opinion should be construed to prevent plaintiffs from representing their citizens within the confines of Rule 23 if the district court determines that the class should be certified under that rule.

The petition for writ of mandamus is denied. The order of the district court permitting the governments to proceed in their official representative or *parens patriae* capacities is reversed. The cause is remanded to the district court with directions to dismiss that count of plaintiffs' complaints for failure to state a proper claim for relief.

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civ. 4-74 496

THE GOVERNMENT OF INDIA, *Plaintiff*,

—against—

PFIZER, INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, OLIN CORPORATION, THE UPJOHN COMPANY, SQUIBB, INC., AND E. R. SQUIBB & SONS, INC.,
Defendants.

MISCELLANEOUS ORDER 74-40

Plaintiff in the above-captioned case has brought suit alleging itself to be the "parens patriae' and "official representative" of its nationals' claims (Complaint, paras. 11 and 12). This Court's previous order on this issue, *Miscellaneous Order 74-37*, entered in 4-71 Civ. 402 and 4-74 Civ. 65, is hereby adopted in this action and plaintiff's representative status is allowed.

The parties in open court (Pre-trial conference of October 22, 1974 at Tr. 108 and 130) consented to the Certification of this ruling to the Eighth Circuit Court of Appeals.

This Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation.

IT IS SO ORDERED.

DATED: October 23, 1974.

/s/ MILES W. LORD
Miles W. Lord
United States District Judge

Appendix C

Miscellaneous Order No. 74-37

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
4-71 Civ. 435

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS

4-71 Civ. 402

THE REPUBLIC OF VIET-NAM, *Plaintiff*,

v.

PFIZER, INC., *et al.*, *Defendants*.

Civ. 4-74-65

THE IMPERIAL GOVERNMENT OF IRAN, *Plaintiff*,

v.

PFIZER, INC., *et al.*, *Defendants*.

Plaintiffs, the Imperial Government of Iran and the Republic of Viet-Nam, have brought suit to recover, *inter alia*, treble the damages said to have been suffered by individual citizens of these governments by reason of defendants' alleged violations of the antitrust laws. Clayton Act, Section 4, 15 U.S.C. § 15 (1970). Defendants have filed a motion to dismiss these claims on the ground that they may be asserted only by the individuals who have been damaged, or by a proper representative of those individuals in

a class action. The question before the Court is therefore whether a sovereign government has standing to assert, under Section 4 of the Clayton Act, claims for damage to individual citizens of that government. The Court concludes that it does and the motions to dismiss are denied.

Defendants' argument to the contrary hinges upon its reading of a line of cases to the effect that the several United States cannot bring suit to recover damages, under Section 4 of the Clayton Act, suffered by individual citizens of those States. *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 260-266 (1972); *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 125-131 (9th Cir. 1973); *California* v. *Frito-Lay, Inc.*, 474 F.2d 774, 775-777 (9th Cir. 1973); *Philadelphia Housing Authority* v. *American Radiator and Standard Sanitary Corp.*, 309 F.Supp. 1057, 1061-1063 (E.D. Pa. 1969). From these cases defendants conclude that Section 4 of the Clayton Act does not create a cause of action in favor of a government seeking to recover trebled damages on behalf of its citizens.

Defendants' reading of these cases—particularly *Hawaii* v. *Standard Oil*—is open to some question.[1] Regardless of that, however, it is difficult to see their application to the cases at hand. Defendants do not, at least for purposes of the instant motion, dispute that individual citizens of Iran and Viet-Nam may sue under Section 4 of the Clayton Act to recover damages for violation of the antitrust laws. The sole question at issue now is whether their governments may assert those causes of action on their behalf, absent formal assignment of the causes of action or an act of expropriation.

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[1] The Court in *Hawaii* viewed the question it was deciding as whether Section 4 of the Clayton Act allowed Hawaii to "recover damages for injury *to its general economy*," 405 U.S. at 264 (emphasis supplied), not damages for injury to individual citizens of the State.

Concededly none of the United States could do so on behalf of its citizens under the cases relied upon by defendants. There is at least a suggestion of this in *Hawaii* v. *Standard Oil*, see 405 U.S. at 255, 265-266, and such is the holding of *California* v. *Frito-Lay* and *Philadelphia Housing Authority*. It is, indeed, questionable whether under the Supremacy Clause of the Constitution alone a State could appropriate to itself, however beneficial the ultimate use, its citizens' rights to recover damages under federal law. Allowing a State to sue for damages on behalf of individual citizens, without their consent, could either subject the defendant to multiple damage claims (when the identical claims were brought by the individuals injured) or, if the State's assertion of those claims were held to bar their assertion by the individuals damaged, amount to a taking of their property without due process of law. And it was the fear of doubled damages or deprivation of the injured individuals' rights that caused the Courts, in the cases relied upon by defendants, to deny the causes of action asserted. *Hawaii* v. *Standard Oil*, 405 U.S. at 263-264; *In re Multidistrict Vehicle Air Pollution*, 481 F.2d at 131 (relying solely on *Frito-Lay*); *California* v. *Frito-Lay*, 474 F.2d at 777-778; *Philadelphia Housing Authority* v. *American Radiator*, 309 F. Supp. at 1061-1062.

Unlike the relationships between a State and its citizens, however, the relationship between a foreign government and *its* citizens is not restricted by the Constitution of the United States. It would be startling, at least, to conclude that foreign application of the antitrust laws was intended by Congress to be limited to those countries where notions of property and relationships between the individual and his government were substantially similar to those prevailing in the United States. In the present cases, the Governments of Iran and of Viet-Nam have asserted that they have the right, under their law, to take claims of this kind from their citizens, litigate those claims, and apply any proceeds from the litigation to the benefit of their

citizens as a whole. Defendants, so far as can be determined, do not take issue with that assertion; they merely argue that it is irrelevant. But since the consequences of such a taking are that the claims may no longer be asserted by the individuals themselves, the defendants need no longer fear a double recovery. And since constitutional restrictions upon such takings by State governments do not apply to foreign governments, the reasons for denying States the power to bring such lawsuits do not apply to the case at hand. The motion to dismiss is therefore denied.
Dated: June 17, 1974

MILES W. LORD

United States District Judge

Appendix D

SUPREME COURT OF THE UNITED STATES

No. A-443

GOVERNMENT OF INDIA, *Petitioner*

v.

PFIZER, INC., ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 9, 1976.

/s/ HARRY A. BLACKMUN
Harry A. Blackmun
Associate Justice of the Supreme Court of the United States

Dated this 13th day of November, 1975.

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

IN RE COORDINATED PRETRIAL PROCEEDINGS
IN ANTIBIOTIC ANTITRUST ACTIONS

THE GOVERNMENT OF INDIA, *Plaintiff*,

v.

PFIZER, INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, OLIN CORPORATION, THE UPJOHN COMPANY, SQUIBB, INC., AND E. R. SQUIBB AND SONS, INC.,
Defendants.

No. Civ. 4-74-496

JURY TRIAL DEMANDED
COMPLAINT

Plaintiff, the Government of India, appearing herein by its attorneys, brings this Complaint against Pfizer, Inc., American Cyanamid Company, Bristol-Myers Company, Olin Corporation, The Upjohn Company, Squibb, Inc., and E. R. Squibb and Sons, Inc.

I
Jurisdiction and Venue

1. The jurisdiction of this Court to hear this Complaint is based upon the original jurisdiction of the Court to hear "any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraint and monopolies," and, as hereinafter set forth, this controversy involves Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2); Act of July 2, 1890, Ch. 647, §§ 1 and 2, 26 Stat. 209, as amended;

Sections 1, 4, 5, 7, 12 and 16 of the Clayton Act (15 U.S.C. §§ 12, 15, 16, 18, 22 and 26), Act of October 15, 1914, Ch. 323, §§ 1, 4, 5, 12 and 16, 38 Stat. 730, 731, 736 and 737, as amended; and rules and laws against fraud and deceit. Plaintiff sues for treble damages, plus costs of suit and reasonable attorney's fees.

2. Each Defendant maintains an office, transacts business, is found, or has an agent within this district.

II
Plaintiff

3. Plaintiff, The Government of India (hereinafter GOI), is a sovereign foreign state with whom the United States of America maintains diplomatic relations.

4. Plaintiff, and Plaintiff's departments, agencies, commissions, institutions, instrumentalities and subdivisions, has purchased, directly and indirectly, substantial amounts of broad spectrum antibiotics and broad spectrum antibiotic products during the period in suit in transactions arising out of the foreign and/or interstate commerce of the United States of America.

III
Capacities in Which Plaintiff Sues

5. Plaintiff, on its own behalf and on behalf of its departments, agencies, commissions, institutions, instrumentalities and subdivisions, maintains this action as a direct and indirect purchaser of broad spectrum antibiotics and broad spectrum antibiotic products (hereinafter BSA and BSAP).

6. Plaintiff maintains this action as the representative of a class consisting of political subdivisions in India which purchased BSA and BSAP.

7. Plaintiff maintains this action as the representative of a class consisting of individual purchasers and con-

sumers in India who purchased and consumed BSA and BSAP.

8. Plaintiff maintains this action as the representative of a class consisting of hospitals and clinics in India which purchased BSA and BSAP.

9. Plaintiff maintains this action as the representative of a class consisting of retailers and wholesalers in India who purchased BSA and BSAP.

10. Plaintiff maintains this action, in a *parens patriae* and proprietary capacity, for damages to its proprietary, commercial and business interests, including loss of foreign exchange, arising from purchases of BSA and BSAP.

11. Plaintiff maintains this action, in a *parens patriae* capacity, for direct out-of-pocket damages suffered by political subdivisions, individuals, hospitals, clinics, retailers, wholesalers and importers in India who purchased BSA and BSAP.

12. Plaintiff maintains this action, in a capacity as official representative of citizens, businesses, institutions and organizations in India, for direct out-of-pocket damages suffered by such citizens, businesses, institutions and organizations due to purchases of BSA and BSAP.

13. Each of the above-mentioned classes is so numerous that joinder of all members is impracticable. There are questions of law and fact common to each class. The claims of the GOI, as the representative of each class, are typical of the claims of each class. And the GOI will fairly and adequately represent each class.

14. This action will be dispositive of the interests of the members of the above-mentioned classes.

15. The questions of law and fact common to the members of each class predominate over questions involving only individual members, and a class action is superior to other available methods for the fair and efficient resolution of the controversy.

* * *

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

IN RE COORDINATED PRETRIAL PROCEEDINGS
IN ANTIBIOTIC ANTITRUST ACTIONS

THE REPUBLIC OF THE PHILIPPINES BY AND THROUGH THE CENTRAL BANK OF THE PHILIPPINES, *Plaintiff*,

v.

PFIZER, INC., ET AL., *Defendants*.

No. 4-71 Civ. 435

No. 4-72 Civ. 312

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECOGNITION OF A PRIVATE-HOSPITAL CLASS IN THE PHILIPPINES

This memorandum is submitted on behalf of all defendants in opposition to the motion of plaintiff, The Republic of the Philippines, for recognition under Rule 23 of the Federal Rules of Civil Procedure of a class of private hospitals in the Philippines. The bases for defendants' opposition to plaintiff's motion are (1) that certification of the class would be premature while a motion to transfer under 28 U.S.C. § 1404(a) is pending and until defendants have had an opportunity for class-action discovery; (2) that a foreign sovereign state and private hospitals are so different in character, in their methods of purchase, and in respect of the defenses to which they will be subject that the former cannot be a proper representative of the latter; and (3) that plaintiff has failed to demonstrate that the

criteria for certification of a class set forth in Rule 23 of he Federal Rules of Civil Procedure have been met.*

* * *

II. A Foreign Sovereign Cannot Be A Proper Class Representative For A Class of Private Hospitals.

Although discovery would be necessary for full consideration of all issues arising out of plaintiff's motion, even without developing additional facts, it is clear that there are inherent objections to a foreign sovereign's acting as a class representative of foreign private hospitals.

The fact situation and important legal issues in this case differ substantially from the domestic antibiotic antitrust actions, making it inappropriate here to rely on earlier opinions of this Court certifying classes in which a domestic governmental unit was a class representative. Plaintiff's attempt to compare its capacity as a class representative to that of domestic governmental entities is deceiving because the Philippines' own claims and the applicable defenses are not typical of those relating to the alleged class.* For example, defendants have raised and will continue to pursue the standing defense as it applies to foreign government plaintiffs. The issue of standing as applied to foreign hospitals involves very different considerations. Defendants will also demonstrate that the Philippines, as a sovereign nation, had broad power, through a variety of regulatory means,* to prevent any alleged damage which it might have incurred through defendants' acts.

The applicable rule of law was stated in *Koos* v. *First*

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* Moreover, no domestic *governmental* entity sought to represent a class of *private* hospitals.

* Such regulatory means include price control laws, tariffs, manufacturing licenses, foreign exchange controls, etc., which plaintiff in fact used to control many aspects of commerce relating to BSA during the alleged damage period.

National Bank of Peoria, 496 F.2d 1162, 1164-65 (7th Cir. 1974);

> Where it is predictable that a major focus of the litigation will be on an arguable defense unique to the named plaintiff or a small subclass, then the named plaintiff is not a proper class representative . . .
>
> Had this case proceeded as a class action, much of the Kooses' efforts would have necessarily been devoted to their own problems posed by the Section 4(b) defense; this may well have resulted in less attention to the issue which would be controlling for the rest of the class. A representative plaintiff should not be permitted to impose such a disadventure on the class.

In our case the claims as well as the defenses of the Philippines are so different from those of the private hospitals that one would have to anticipate the same diversion of attention from controlling issues the court would not permit in *Koos*. Unlike domestic cases in which state governments represented *public* hospital classes, plaintiff did not buy BSAs in the same market as the class members. Plaintiff cannot dispute that the government market in the Philippines is totally different from the private market in method of sale, pricing, chain of distribution, and in other respects.

Moreover, while the plaintiff seeks damages for overpayments for BSA products both for itself and in behalf of the class of government hospitals, it also alleges in Paragraph 76(b) of the Amended Complaint that it was injured by being deprived of vital foreign exchange reserves. Not only in this claim for loss of foreign exchange reserve unique to the Government, but also it is a novel type of antitrust claim that will require separate proof and separate legal analysis apart from the common claim relating to purchase of BSAs.

* * *